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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT JAMES LEEK,

Defendant and Appellant.

G040135

(Super. Ct. No. 02SF0380)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Richard M. King, Judge. Affirmed as modified.

John L. Dodd & Associates and John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Melissa Mandel and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Robert James Leek pleaded guilty to multiple counts of oral copulation and sodomy of a person under age 14 by a person more than 10 years older (Penal Code §§ 288a, subd. (c)(1), 286, subd. (c)(1); all statutory references are to this code), plus sodomy and oral copulation of a person under age 16 by a person over age 21 (§§ 288a, subd. (b)(2); § 286, subd. (b)(2)). The court granted defendant probation on the conditions that he serve 365 days in jail and pay restitution.

Defendant challenges the restitution order, contending the court exceeded its jurisdiction when it increased the amount of restitution without requiring a showing of changed circumstances, it included expenses incurred prior to the date of his charged offenses, and the increase in restitution is barred by laches. We agree it was error to include in the restitution order an expense occurring outside the charged periods. In all other respects, the order is affirmed.

## FACTS

Defendant pleaded guilty to sexually molesting a 12-to-15 year-old minor on numerous occasions. In July 2003, the court placed defendant on five years' formal probation on certain conditions, including that he serve 365 days in jail and "[m]ake full restitution in amount and manner as determined by the court in count(s) 1 through 12." The prosecutor indicated he had receipts from the victim's family, which the court ordered submitted to the probation department for a finding. The court stated it would hold a hearing if defendant objected to any of the amounts, but "if he [did] not object, then they're ordered and as found by the probation officer." The minute order reflects the court ordered defendant to "[p]ay restitution in the amount as determined and directed by Probation Officer as to count(s) 1 [through] 12" and "[m]ake full restitution to the victim(s) including costs incurred for medical or psychological treatment resulting from this case (mandatory where the victim is a minor [per section] 1203.1g)."

Fifteen months later, defendant and the probation department entered a stipulation “that judgment for unpaid [r]estitution be entered against [defendant] in favor of the County of Orange in the amount of \$256.07 . . .” and the “California Victim Comp[ensation Board]” (capitalization omitted) in the amount of \$4,465. The judgment part on the bottom of the stipulation was not signed by the judge. Defendant also stipulated he was able to pay only \$50 a month.

In following up on the restitution in 2006, the victim’s mother discovered the probation department did not have the bills she had submitted at the 2003 sentencing hearing. After locating them in the district attorney’s possession, she provided them to the probation department and submitted additional bills.

The probation department prepared a progress report in August 2007, stating “restitution has been set at \$33,654.48 for the costs of medical and psychological treatment incurred by the victim. According to the Collection Officer, the restitution was set at this amount after the victim’s mother submitted bills for residential treatment, individual counseling, and medical bills. In addition, the victim’s mother submitted bills for emergency room visits and ambulance care after the victim attempted suicide. The victim’s mother has [also] submitted documents from mental health professionals that link the victim’s emotional problems to post-traumatic stress syndrome as a result of sexual abuse by the [defendant].” Defendant requested a hearing claiming inability to pay the restitution amount.

At the February 2008 hearing, the victim’s mother testified regarding the bills she had previously presented to the prosecutor at defendant’s sentencing. She also testified to other expenses incurred after the time period documented by the bills. The court found the expenditures supported by the bills totaled \$34,199.48, and that the additional expenses totaled \$8,786. But it requested further briefing regarding the legal effect of the stipulation between defendant and the probation department for \$4,465.

The next month, following briefing and argument, the court ordered victim restitution in the amount of \$42,985.48. It also ordered 10 percent interest per annum on that amount commencing on March 31, 2003, the date of the last bill originally submitted by the victim's mother at the sentencing hearing and a date at which half the losses occurred before and the other half occurred after. The prosecution requested the court extend probation for three years, arguing the unpaid victim restitution constituted a change of circumstances that justified extending the probation period. The court agreed and ordered the probation extended for 18 months, stating it believed "there is a changed circumstance" in the "\$8,700 that . . . surface[d] after 2003 . . . ." Also, nobody "at the time of the plea knew what the harm and the devastation, the lack of esteem, . . . and these things surfaced during the period of probation, and the victim . . . is allowed to seek counseling so [he] can cope with that condition that was caused by the defendant's conduct." It concluded "for those two reasons, even if everybody knew what the amounts were, this [\$]8,700 came afterwards, I think that in and of itself is sufficient to extend probation. [¶] The question is how long. And I just feel that taking into account the fact that the defendant has obviously performed satisfactorily on probation . . . and . . . it appears [he] has done everything he can to pay the restitution, . . . the court feels that extending probation by 18 months is warranted by the record."

## DISCUSSION

### *1. Jurisdiction*

Defendant argues the court exceeded its jurisdiction by increasing the restitution amount to \$42,985.48 without requiring a showing of changed circumstances. According to him, the only change in circumstances, i.e., expenses incurred after August 2007, justified an increase of \$8,786.00 because the balance "was otherwise based on

expenses that occurred before the restitution stipulation.” (Italics omitted.) The contention lacks merit.

California crime victims have a constitutional and statutory right to receive full restitution for economic loss suffered as a result of a defendant’s criminal conduct. (Cal. Const., art. I, § 28, subd. (b)(13); § 1202.4, subds. (a) & (f); *People v. Hamilton* (2003) 114 Cal.App.4th 932, 939.) An order for anything less than full restitution is invalid. (*People v. Bernal* (2002) 101 Cal.App.4th 155, 165.) Additionally, a victim’s right to full “restitution may not be bargained away by the People. ‘The Legislature left no discretion or authority with the trial court or the prosecution to bargain away the victim’s constitutional and statutory right to restitution. As such, it cannot properly be the subject of plea negotiations.’ [Citation.]” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1226.)

Thus, contrary to defendant’s contention, the stipulation between the probation department and defendant for restitution in the amount of \$4,465 did not bar the trial court from subsequently ordering full restitution that included expenses incurred before the stipulation was entered. The fact the stipulation was one “for entry of judgment and judgment” (capitalization omitted) as defendant asserts does not affect our analysis because judgment was never in fact entered and in any event the stipulation was invalid because it was for an amount less than full restitution.

Relying on *People v. Cookson* (1991) 54 Cal.3d 1091, defendant maintains that because \$34,199.48 of the \$42,985.48 was ascertainable at the time he was sentenced, “a finding of change in circumstances is required to support an increase in the amount of restitution.” But *Cookson* did not involve a crime victim’s entitlement to full restitution and merely held “[a] change in circumstances is required before a court has jurisdiction to extend or otherwise modify probation. . . . ‘An order modifying the terms of probation *based upon the same facts* as the original order granting probation is in

excess of the jurisdiction of the court, for the reason that there is no factual basis to support it.’ [Citation.]” (*Id.* at p. 1095.)

Here, defendant does not challenge the order extending probation. Nor did the court modify the probation terms as full victim restitution had always been a condition of defendant’s probation. Even if an increase in the amount of restitution could be considered a modification of the probation terms thus necessitating a change in circumstances, the requirement was satisfied by fact the probation department apparently never received the receipts submitted by the victim’s mother at the sentencing hearing until several years later. Thus the court’s determination of \$42,985.48 as the restitution amount was based on different facts that the probation department did not have when it entered the stipulation with defendant. Moreover, defendant’s stipulation to pay \$4,465 to the California Victim Compensation Board was for services it directly provided the victim. As defense counsel acknowledged, the \$42,985.48 did not include any amount paid to that agency.

## *2. Expense Incurred Prior to Charged Offenses*

Defendant contends the restitution amount improperly included \$1,728.50 for the cost of the victim’s placement in a youth shelter in June 1998 due to suicidal feelings. According to him, the earliest crime he was charged with and to which he pleaded guilty occurred in December 1998 and therefore the victim’s feelings six months before could not have been caused by defendant’s crimes. We agree.

The Attorney General is correct that “[u]nder certain circumstances,” courts have held victim restitution may be imposed based on “conduct underlying . . . uncharged counts . . . .” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) But in those cases, the defendant had signed a waiver under *People v. Harvey* (1979) 25 Cal.3d 754 expressly agreeing that the sentencing court could consider the uncharged conduct. (See *People v. DiMora* (1992) 10 Cal.App.4th 1545, 1550; *People v. Goulart* (1990) 224 Cal.App.3d 71,

79; *People v. Baumann* (1985) 176 Cal.App.3d 67, 73.) *People v. Harvey, supra*, 25 Cal.3d at p. 758 held that, without an agreement to the contrary, the facts underlying counts dismissed under a plea bargain should not be considered in determining the appropriate sentence. The same rule applies to uncharged acts. (*Ibid.*; *People v. Goulart, supra*, 224 Cal.App.3d at p. 79; *People v. Baumann, supra*, 176 Cal.App.3d at p. 76.)

Here, defendant pleaded guilty to all counts and there was no evidence of any uncharged conduct at the time of his plea. Thus, there was no need for and he did not sign a *Harvey* waiver. Consequently, the court erred in imposing restitution based on uncharged conduct occurring prior to the first offense charged. The amount of \$1,728.50 is ordered stricken from the victim restitution order.

### 3. *Laches*

Defendant's final argument is that laches bars the increase in restitution. But as he acknowledges, "[l]aches can be asserted only in a suit in equity" (*People v. Harvest* (2000) 84 Cal.App.4th 641, 652), which this case was not. For the first time in his reply brief, defendant asserts "that principles of estoppel, rather than laches, must apply." Generally, we will not consider issues raised for the first time in the reply brief. (*People v. Lewis* (2008) 43 Cal.4th 415, 536, fn. 30.) In any event, the contention lacks merit. "[A]lthough estoppel may be invoked against the government, it will not be upheld if it will defeat a strong public policy [citation], and the constitutional mandate for victim restitution [citation] qualifies as such." (*People v. Harvest, supra*, 84 Cal.App.4th at p. 652.)

## DISPOSITION

The trial court is directed to strike \$1,728.50 from the order imposing \$42,985.48 in restitution and to enter a new restitution order in the amount of \$41,256.98. As amended, the order is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.